APPENDIX A

[SEAL] THE SUPREME COURT OF TEXAS
Post Office Box 12248
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Case Number: 01-0463
Court of Appeals Number: 11-00-00196-CV
Trial Court Number: 99-06-40563A

MORGAN WISE,

v.

WANDA WISE FRYAR.

July 12, 2001

Mr. John Henry Rheinscheld
306 Scurry Street
Big Spring, TX 79720

Mr. Robert D. Miller
608 Scurry Street
Big Spring, TX 79720

Ms. Phyllis Butler Royal
P.O. Box 4774
Odessa, TX 79760

Dear Counsel:

Today, the Supreme Court of Texas denied the petition for review in the above styled case.

Sincerely,

John T Adams, Clerk
By /s/ Tanya R. Hunter
TANYA R. HUNTER, Deputy Clerk

cc: Ms. Sherry Williamson, Clerk
Ms. Glenda Brasel

APPENDIX B

11TH COURT OF APPEALS
Eastland, Texas

No. 00-00196-CV
Appeal from Howard County

MORGAN WISE,
Appellant,

vs.

WANDA ELAINE WISE FRYAR,
Appellee.

OPINION

The question before this court is one of procedure. In 1999, appellant brought a bill of review challenging the trial court's final 1996 decree of divorce in which appellant was found to be the father of four children and in which appellant was awarded custody of all the children. In order for the trial court to be able to reach the merits of his arguments, appellant first had to prove that he was entitled to present his claims by a bill of review. The trial court found that he did not; therefore, the bill of review was denied without reaching the merits of appellant's claims.

The threshold issue before this court is whether it was error to deny appellant's bill of review. Because appellant did not establish that he was entitled to proceed with a bill of review, the trial court did not err, and the judgment is affirmed.

A bill of review is a unique equitable remedy attacking a final judgment; and, as such, Texas law provides that the remedy is available in limited situations. The Texas Supreme Court in *Alexander v. Hagedorn*, 226 S.W.2d 996 (Tex. 1950), announced the general rules for a bill of review and

explained why a bill of review is appropriate only in exceptional circumstances:

> Because it is fundamentally important in the administration of justice that some finality be accorded to judgments, these essentials have been uniformly recognized by our courts; therefore, bills of review seeking relief from judgments "are always watched by courts of equity with extreme jealousy, and the grounds on which interference will be allowed are narrow and restricted"; and the rules are not to be relaxed merely because it may appear in some particular case that an injustice has been done. *Harding v. W. L. Pearson & Co. et al.*, Tex.Com.App., 48 S.W.2d 964. As said by the Supreme Court of California, "Endless litigation, in which nothing was ever finally determined, would be worse than occasional miscarriages of justice." *Pico v. Cohn et al.*, 91 Cal. 129, 25 P. 970, 971, 27 P. 537, 13 L.R.A. 336, 25 Am.St.Rep.159.

Alexander v. Hagedorn, supra at 998; *Bristow v. Bristow*, 834 S.W.2d 497 (Tex.App.—Eastland 1992, no writ).

The parties in this case, Morgan Wise and Wanda Elaine Wise Fryar, were married in August 1983. Four children were born during their marriage: a girl in 1985 and three boys in 1989, 1991, and 1992. Wanda filed an original petition for divorce on January 10, 1996. Shortly thereafter Morgan filed a cross-petition for divorce seeking appointment as sole managing conservator of all four children. Both Wanda and Morgan alleged that they were the parents of all four of their children. The jury determined that Morgan should be appointed sole managing conservator of all four children. The trial court signed the final divorce decree on September 13, 1996, dissolving the marriage, determining that Wanda and Morgan were the parents of all four children, and appointing Morgan sole managing conservator of all four children. The divorce decree was not appealed.

Morgan remained sole managing conservator of the children until January 19, 1999, when he and Wanda agreed to modify custody. On March 2, 1999, Morgan-filed a petition to again modify the parent-child relationship by seeking temporary orders appointing him sole managing conservator for the couple's youngest son and by alleging that the child's "present living environment may endanger the child's physical health or significantly impair the child's emotional development." Morgan contended that, since the agreed modification to custody, his youngest son had not received the necessary medical treatment for the child's cystic fibrosis, that the child at that time was hospitalized with pneumonia as a result, that the child's health appeared to "be going downhill," and that Wanda could not "treat this child the way the child should be treated for Cystic Fibrosis."

Three months later on June 17, 1999, Morgan filed the original petition for bill of review attacking the divorce decree by alleging for the first time that the three boys were not his biological children and that Wanda not only failed to disclose her "extra-marital affairs" but also "concealed a material fact": the identity of the father. Morgan amended his petition for bill of review to include a petition to establish paternity and tort claims of fraud and conspiracy. Morgan later filed a motion to sever his bill of review claims from these other claims. The motion was granted.

On March 28, 2000, the trial court conducted a hearing on Morgan's bill of review. Morgan testified that, while Wanda was pregnant with their first child, there was an "incident" between Wanda and a man she worked for. Morgan stated that, while their first child was still in diapers, he found a card written by Wanda to another man. Morgan testified that:

> It just said—stated that, "Your parents were nice," that she met her—met his parents, and that they spent, you know, I guess, the day together and—you know, with [Morgan and Wanda's daughter], because she

> mentioned, you know, that—with [Morgan and Wanda's daughter] there. And at the bottom was that "If you will take [Morgan and Wanda's daughter] and I, I will leave Morgan."

Morgan further testified that he found this card prior to the birth of the three boys, that he talked to Wanda about the card, that they "worked it out," that he did not remember the specifics of their conversation, and that he had not assumed that Wanda was having sex with the man to whom the card was addressed. Both in his deposition taken at the time of the divorce and at the bill of review hearing, Morgan acknowledged that "[s]omething had to go on for her to just want to get up and leave me." Morgan alleged in his amended bill of review that this man was the biological father of the three boys.

Morgan also testified that, at the time of the divorce, he did not see a need for paternity testing and that his attorney did not advise him "either way" about paternity testing. Morgan testified about Wanda and a man from Oklahoma but stated that he did not know if there had been a sexual relationship between the man and Wanda. Morgan identified a handwritten document as a list of psychological abuses he had suffered. Morgan testified that he had prepared the list for his attorney during the divorce. The first three items read: "Embezzling money from employer. Her affairs in Abilene. Her affairs in Big Spring." At the bill of review hearing, Morgan testified, "That's what I call them was affairs. I didn't go in depth as far as—but I didn't know that any sexual relationship— no, I did not." Morgan stated that, while he could speculate, he had never known what happened during Wanda's "affairs." Morgan identified six different men with whom, at the time of their divorce, he was aware that Wanda had had "affairs" with during their marriage.

Morgan further testified that he had had no reason to question paternity until after he received the results of a cystic

fibrosis screen in March 1999. Morgan stated that, in order for the youngest child to be his biological child, Morgan would either have to have cystic fibrosis or have to be a carrier. Morgan testified that he did the test because he did not have cystic fibrosis and because he wanted "to see if [he] was a carrier of cystic fibrosis." Morgan said that the results showed that he was not a carrier of cystic fibrosis.

The law in Texas is well-settled concerning when a bill of review is appropriate. *Tice v. City of Pasadena*, 767 S.W.2d 700 (Tex. 1989) (original proceeding); *Transworld Financial Services Corporation v. Briscoe*, 722 S.W.2d 407 (Tex.1987); *Montgomery v. Kennedy*, 669 S.W.2d 309 (Tex.1984); *Baker v. Goldsmith*, 582 S.W.2d 404 (Tex.1979); *Petro-Chemical Transport, Inc. v. Carroll*, 514 S.W.2d 240 (Tex.1974); *Alexander v. Hagedorn, supra.* A bill of review is an independent equitable attack on a judgment which has become final because the time for filing a motion for new trial or for appealing the judgment has passed, and it is brought by a party to the final judgment. *Tice v. City of Pasadena, supra*; *Transworld Financial Services Corporation v. Briscoe, supra*; *Montgomery v. Kennedy, supra*; *Baker v. Goldsmith, supra*; *Alexander v. Hagedorn, supra.* In order to successfully attack the final judgment, the petitioner must allege and prove (1) a meritorious defense to the cause of action alleged to support the judgment (2) which the petitioner was prevented from making by fraud, accident, or wrongful act of the opposite party (3) unmixed with any fault or negligence of the petitioner. *Tice v. City of Pasadena, supra*; *Transworld Financial Services Corporation v. Briscoe supra*; *Montgomery v. Kennedy, supra*; *Baker v. Goldsmith, supra*; *Petro-Chemical Transport, Inc. v. Carroll, supra*; *Alexander v. Hagedorn, supra.*

Before the merits of his assertions can be reached, Morgan must first establish that he was entitled to the extraordinary relief of a bill of review under Texas law. Morgan failed to

meet this threshold requirement. In particular, Morgan did not establish that his failure to pursue paternity during the 1996 divorce proceedings was without negligence or fault on his part and was due to extrinsic fraud.

In 1983, 13 years before the divorce proceedings in this case, the Texas Legislature amended the Texas Family Code to allow a man the means to deny the paternity of a child born or conceived during the man's marriage. Former TEX. FAM. CODE § 12.06 (1983) now TEX. FAM. CODE ANN. § 160.101 (Vemon Supp. 2001). When he filed his cross-petition for divorce, Morgan could have elected to challenge the paternity of any or all of the four children born during his marriage to Wanda. The record reflects that, at the time of their divorce, Morgan was aware not only of what Morgan described as Wanda's "affairs" in two cities and of her offer made prior to the birth of the three boys to leave Morgan for another man but also that Wanda had had these "affairs" with at least six men during their marriage. Instead of contesting paternity, Morgan chose to seek appointment as sole managing conservator of all four of the children born during his marriage to Wanda.

The type of fraud which the petitioner must allege and prove is "extrinsic" not "intrinsic." *Tice v. City of Pasadena, supra*; *Transworld Financial Services Corporation v. Briscoe, supra*; *Montgomery v. Kennedy, supra*; *Alexander v. Hagedorn, supra*; *Bristow v. Bristow, supra*. The court in *Montgomery v. Kennedy, supra* at 312-13, explained the difference between extrinsic and intrinsic fraud as follows:

> In relation to attacks on final judgments, fraud is classified as either extrinsic or intrinsic. Only extrinsic fraud will entitle petitioners to bill of review relief. *Alexander v. Hagedorn, Id.* at 574, 226 S.W.2d at 1001.
>
> We have stated or expressly approved that extrinsic fraud is that fraud which denies a losing litigant the opportunity to fully litigate his rights or defenses upon

trial. *Id.* Extrinsic fraud is "collateral" fraud in the sense that it must be collateral to the matter actually tried and not something which was actually or potentially in issue in the trial. *Crouch v. McGaw*, 134 Tex. 633, 639, 138 S.W.2d 94, 97 (1940). Extrinsic fraud is conduct that prevents a real trial upon the issues involved. *O'Meara v. O'Meara*, 181 S.W.2d 891, 893 (Tex.Civ.App.-San Antonio 1944, *writ ref'd*). Intrinsic fraud, on the other hand, is inherent in the matter considered and determined in the trial "where the fraudulent acts pertain to an issue involved in the original action, or where the acts constituting the fraud were, or could have been litigated therein." *Mills v. Baird*, 147 S.W.2d 312, 316 (Tex.Civ.App.—Austin 1941, *writ ref'd*).

Included in intrinsic fraud are fraudulent instruments, perjured testimony, or any matter which was actually presented to and considered by the trial court in rendering the judgment assailed. *Alexander v. Hagedorn*, 148 Tex. at 574, 226 S.W.2d at 1001. It is particularly well-established that the alleged perjury of a witness on a contested issue, which the opposing party had the opportumty to refute, is intrinsic fraud. *Crouch v. McGaw*, 134 Tex. at 637,138 S.W.2d at 96.

Tice v. City of Pasadena, supra; *Alexander v. Hagedora, supra*; *Bristow v. Bristow, supra.*

The fraud which Morgan alleges, that Wanda concealed and lied about her affairs with other men and about the parentage of the three boys bore during their marriage breaching her fiduciary duty to Morgan, is not extrinsic fraud as Morgan contends. These are allegations of intrinsic fraud concerning an issue that was admitted, uncontested, and settled in the divorce proceeding: parentage of the children born of the marriage. *Tice v. City of Pasadena, supra*, *Montgomery v. Kennedy, supra*; *Alexander v. Hagedom,*

supra; *Ortmann v. Ortmann*, 999 S.W.2d 85 (Tex.App.-Houston [14th Dist.] 1999, *pet'n den'd*); *Bristow v. Bristow, supra*; *Shelton v. Ray*, 570 S.W.2d 419 (Tex.Civ.App.-El Paso 1978, no writ).

Morgan also contends that the denial of his petition for bill of review violated his state and federal constitutional rights of due process and equal protection by taking his property in the form of child support and by preventing him from presenting DNA evidence concerning paternity of the three boys. We disagree. Morgan opted not to pursue paternity of any of his children in 1996 even though he was aware of Wanda's "affairs" with at least six men in two different cities, and he voluntarily chose to modify custody and support arrangements in January 1999. The equitable remedy of bill of review is not available to challenge the prior choices a party has made concerning issues which have been litigated and resolved in a final, unappealed judgment. *Tice v. City of Pasadena, supra*; *Transworld Financial Services Corporation v. Briscoe, supra*; *Montgomery v. Kennedy, supra*; *Baker v. Goldsmith, supra*; *Petro-Chemical Transport, Inc. v. Carroll; supra*; *Alexander v. Hagedorn, supra*. Morgan's failure to establish the long-standing requirements necessary to present on a bill of review does not make the denial of his bill of review a denial of his constitutional rights.

Morgan argues that the trial court erred in denying him the opportunity to present a bill of review on behalf of the three boys as next friend. A bill of review must be brought by a party to the challenged judgment or decree. *Tice v. City of Pasadena, supra*; *Transworld Financial Services Corporation v. Briscoe, supra*; *Montgomery v. Kennedy, supra*; *Baker v. Goldsmith, supra*; *Alexander v. Hagedorn, supra*. The children were not parties to the divorce proceedings and, therefore, were not entitled to bring a bill of review proceeding. R.M.H. by *Gabert v. Messick*, 828 S.W.2d 226 (TexApp.-Fort Worth 1992, no writ).

Because the requirements for a bill of review were not met, the trial court did not err in denying Morgan's petition.[1] Morgan's five points of error and his arguments under each point are overruled.

The Judgment of the trial court is a affirmed.

/s/ Jim R. Wright
JIM R. WRIGHT
JUSTICE

April 26, 2001

Publish. See TEX.R.APP.P. 47.3(b).

Panel consists of: Arnot, CJ., and
Wright, J., and McCall, J.

[1] We note that, under similar circumstances, the Massachusetts Supreme Court recently reached the same result. Paternity of Cheryl, No. SJC-08391, 2001 Mass. LEXIS 198 (Mass., April 24, 2001).

11TH COURT OF APPEALS
EASTLAND, TEXAS

No.11-00-00196-CV

MORGAN WISE,	* From the 118th District Court of Howard County, Trial Court No. 99-06-40563.
Vs.	* April 26, 2001
WANDA ELAINE WISE FRYER,	* Opinion by Weight, J. (Panel consists of Arnot CJ., Wright, J., and McCall, J.)

JUDGMENT

This court has inspected the record in this cause and concludes that there is no error in the judgment below. Therefore, in accordance with this court's opinion, the judgment of the trial court is in all things affirmed. The costs incurred by reason of this appeal are taxed against Morgan Wise.

APPENDIX C

IN THE DISTRICT COURT
118TH JUDICIAL DISTRICT
HOWARD COUNTY, TEXAS

No. 99-06-40563A

MORGAN WISE,

VS.

WANDA ELAINE WISE FRYAR.

FINAL JUDGMENT

Came on the 28th day of March, 2000, a hearing was held on the Petitioner's Bill of Review.

I.

Petitioner, Morgan Wise, appeared in person and through his attorney of record, Robert D. Miller, and announced ready.

Defendant, Wanda Elaine Wise Fryar, appeared in person and through her attorney of record, Phyllis Royal, and announced ready.

Defendant, DeWayne Alexander, appeared through his attorney of record, Celia Trimble Boone, and announced ready.

II.

The Court, after hearing and considering the evidence;

IT IS ORDERED ADJUDGED AND DECREED that the Petitioner's relief for Bill of Review is hereby DENIED.

IT IS FURTHER ORDERED AND DECREED that Morgan Wise is denied an order of paternity testing of DeWayne Alexander as the biological father of the minor children, Rowdie Morgan Wise, Marti Eugene Wise and Rauli Tabor Wise.

All other relief not specifically provided herein is denied. All costs of court shall be assessed against the party incurring the same.

SIGNED the 24th day of 2000.

/s/ Robert H. Moore, III
ROBERT H. MOORE, III
JUDGE PRESIDING

APPENDIX D

IN THE DISTRICT COURT
118TH JUDICIAL DISTRICT
HOWARD COUNTY, TEXAS

No. 40563

MORGAN ODIS WISE,

vs.

WANDA ELAINE FRYAR.

CORRECTED FINAL JUDGMENT DENYING MORGAN WISE'S SECOND AMENDED PETITION FOR BILL OF REVIEW

On the 28th day of March 2000, a hearing was held on MORGAN WISE'S Second Amended Petition for Bill of Review filed herein.

I.

Petitioner, MORGAN WISE, appeared in person and through his attorney of record, ROBERT D. MILLER and announced ready.

Defendant, WANDA ELAINE FRYAR, appeared in person and through her attorney of record, PHYLLIS ROYAL, and announced ready.

Respondent, DEWAYNE ALEXANDER, appeared through his attorney of record, CELIA BOONE TRIMBLE, and announced ready.

II.

The Court, after examining the record, hearing the evidence and argument of counsel, finds that MORGAN WISE'S Second Amended Petition for Bill of Review should be DENIED.

III.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that MORGAN WISE'S Second Amended Petition for Bill of Review is hereby DENIED.

IT IS FURTHER ORDERED that all other relief, with the exception of attorney's fees/costs, not specifically granted herein is denied.

/s/ Robert H. Moore, III
ROBERT H. MOORE, III
Presiding Judge
July 5th 2000

APPENDIX E

IN THE DISTRICT COURT
118TH JUDICIAL DISTRICT
HOWARD COUNTY, TEXAS

[Filed Mar. 14, 2000]

MORGAN WISE,

vs.

WANDA ELAINE WISE FRYAR.

SECOND AMENDED PETITION FOR BILL OF REVIEW

NOW COMES, Morgan Wise, individually and as next of friend for Rowdie Morgan Wise, Marti Eugene Wise and Raulie Tabor Wise complaining of Wanda Elaine Wise Fryar and DeWayne Alexander, Defendant's and for cause of action would show:

I.

Morgan Wise is a resident of Howard County, Texas.

Morgan Wise, as next of friend for Rowdie Morgan Wise, Marti Eugene Wise and Rauli Tabor Wise are all residents of Howard County, Texas.

Defendant, WANDA ELAINE WISE FRYAR is a resident of Howard County, Texas.

Defendant, DEWAYNE ALEXANDER is a resident of Taylor County, Texas.

II.

This suit is designated as a Level Two Discovery Control Plan in accordance with Rule 190.2 of the Texas Rules of Civil Procedure.

ALLEGATIONS OF FACTS TO SUSTAIN THIS PETITION FOR BILL OF REVIEW AND ORIGINAL PETITION

The Final Decree of Divorce entered by this court on the 13th day of September, 1996. Less than four years have expired since the entry of the Final Decree of Divorce. The Final Divorce Decree in Cause No. 96-01-038243 reflects that the Plaintiff and the Defendant, WANDA ELAINE WISE FRYAR, are the parents of three minor children, ROWDIE MORGAN WISE, MARTI EUGENE WISE and RAULIE TABOR WISE. At the time of the entry of such divorce decree the Plaintiff had no knowledge that the minor children were not his biological children. By virtue of DNA testing, by report dated March 18, 1999, such tests reflect that the Plaintiff is excluded as the biological father of the children, ROWDIE MORGAN WISE, MARTI EUGENE WISE and RAULIE TABOR WISE. Copies of such reports are attached hereto and marked Exhibit "A", Exhibit "B" and Exhibit "C" and made a part hereof for all purposes. Through subsequent court hearings the Defendant, WANDA ELAINE WISE FRYAR, has disclosed that the alleged biological father of the three minor children is the Defendant, DEWAYNE ALEXANDER.

FIRST CAUSE OF ACTION—BILL OF REVIEW

A. LEGAL REQUIREMENTS OF BILL OF REVIEW

1.

This Plaintiff, Morgan Wise, individually, in filing this Bill of Review states that he has a meritorious defense to the Original Divorce Petition wherein there was a finding that the Plaintiff was the father of the three minor children. Extrinsic fraud and actual fraud was committed upon this Plaintiff by the Defendant, WANDA ELAINE WISE FRYAR, by the acts of the Defendant, WANDA ELAINE WISE FRYAR, in preventing the Plaintiff from availing himself of the timely

opportunity to raise the issue of paternity and was therefore denied a fair opportunity to raise the issue of paternity during the time of trial. As a result of the marriage and confidential relationship existing between Plaintiff and Defendant, WANDA ELAINE WISE FRYAR, a fiduciary relationship existed between Plaintiff and Defendant, WANDA ELAINE WISE FRYAR. Plaintiff to his detriment relied upon this confidential relationship at the time paternity was established of the three minor children. The Defendant, WANDA ELAINE WISE FRYAR, concealed a material fact thus breaching her fiduciary relationship to the Plaintiff in the marriage relationship which existed between the parties in denying to the Plaintiff that the Defendant, WANDA ELAINE WISE FRYAR, had extra-marital affairs during the term of the marriage relationship. Specifically, the Defendant, WANDA ELAINE WISE FRYAR, denied that there had ever been any extra-marital relationships with other parties which resulted in the paternity of the three minor children by other men other than that of the Plaintiff. This concealment of the material fact by the Defendant, WANDA ELAINE WISE FRYAR, breached a fiduciary relationship which she had with the Plaintiff which constituted extrinsic fraud and further prevented the Plaintiff from even knowing of his right to deny paternity pursuant to Section 160.101 of the Texas Family Code.

2.

The Plaintiff will establish that the fraud and the wrongful act of the Defendant, WANDA ELAINE WISE FRYAR, in failing to disclose extra-marital relationship with other men during the marriage relationship and the failure to disclose that the minor children's biological father may be some other person than that of the Plaintiff resulted in a fraud being perpetuated upon this Plaintiff and the Court. Further, Plaintiff had no reasonable way of knowing that such fraud was being committed by Defendant.

3.

This Plaintiff states that the three minor children are not the biological children of this Plaintiff by virtue of DNA testing by report dated March 18, 1999 which reflects that the Plaintiff is excluded as the biological father of the children, ROWDIE MORGAN WISE, MARTI EUGENE WISE and RAULIE TABOR WISE, copies of such reports are attached hereto and marked Exhibit "A", Exhibit "B", and Exhibit "C" and made a part hereof for all purposes. Such reports constitutes prima facie proof of the meritorious defense of this Plaintiff in the Original Petition for Divorce filed by the Defendant, WANDA ELAINE WISE, in cause number 96-01-38243 wherein the Defendant, WANDA ELAINE WISE, as Plaintiff alleged that this Plaintiff, MORGAN ODIS WISE, was the father of the three minor children. But for the extrinsic fraud exercised by this Defendant, WANDA ELAINE WISE FRYAR, upon the Plaintiff this Plaintiff would have timely raised the issue of paternity pursuant to Section 160.101 of the Texas Family Code and Section 3 wherein a man presumed to be the father of a child may contest his own paternity. Such DNA testing constitutes prima facie proof of a meritorious defense to his alleged paternity.

4.

The Plaintiff has met the requirement of presenting prima facie proof of meritorious defense by virtue of the DNA testing as such testing is not barred as a matter of law in the defense in the original proceeding of the Petition for Divorce and this Plaintiff will be entitled to judgment that the three minor children are not the presumed children of this Plaintiff and are thus not born of the marriage and this Plaintiff will be entitled to judgment on retrial if no evidence to the contrary is offered. The prior judgment in the Decree of Divorce was obtained by the Defendant, WANDA ELAINE WISE FRYAR, as a result of fraud and wrongful acts of the Defendant.

5.

A spouse has a fiduciary duty of full disclosure to the other spouse of the assets of the estate. The assets and debts of the community estate are factors taken into consideration to determine the amount of child support to be paid. Therefore, the duty of full disclosure definitely extends to the birth of the children pursuant to the marriage relationship, since a parent is liable to support and provide the necessities for children of the marriage. As the Defendant as wife represents a special trustee, the procreation of children of the marriage relationship, her fraudulent concealment of the paternity of the children and further by the actual perjury of the Defendant at time of the original trial constitutes extrinsic fraud. This fraud of the Defendant upon the Plaintiff was such, in conjunction with her perjured testimony, as to prevent the Plaintiff from presenting upon the trial his legal defense to paternity in the original proceedings. *Montgomery vs Kennedy*, 669 SW2d 309, (Tex-1984), *McMurray vs McMurray*, 4 SW2d 357 (Tex-1887), *State vs Wright*, 56 SW2d 950 (Tex.Civ.App.-Austin, 1933 no writ). The extrinsic fraud of the Defendant upon the Plaintiff is such a fraud which prevented the Plaintiff from knowing about and presenting his legal rights at trial. Attached hereto and made a part hereof is Plaintiff's Sworn Affidavit presenting prima facie proof of the allegations herein contained made a part hereof as Exhibit "D" for all purposes.

The Defendant, Wise breached her fiduciary duty to the children in denying access to the biological father as to his financial assets and the right to inherit from the biological father. In addition, the Defendant, Wise breached her fiduciary duty to the minor children in denying them knowledge of the biological father in so far as the same pertains to medical and/or psychological problems the children may inherit due to genetics. It is in the best interest of the children to have knowledge of their biological father

for medical information. The failure to disclose the biological father to the minor children denies the minor children of their rights of medical information, child support and financial inheritance. The right to standing concerning any tort liability or wrongful death of the biological father is also being denied to the minor children. Plaintiff as next of friend for the minor children and in their behalf seeks the determination of the biological father and the denial of the presumption of paternity of the Plaintiff.

There is no difference between fraud going to the issue of paternity at the time of trial and fraud going to the issue of property at the time of trial. As a matter of fact, it is easier to conceal paternity, thereby making it impossible to fully litigate the issue of paternity at the time of trial than it is to discover hidden assets through discovery requests to secondary sources such as the IRS, accountants, employees, etc.

6.

The Defendant, DEWAYNE ALEXANDER, the alleged biological father, is a necessary party to the original divorce decree and the Suit Affecting the Parent-Child Relationship, and as a necessary party should have been joined into the proceeding. The failure to join the Defendant, DEWAYNE ALEXANDER, results in obtaining a decree which does not dispose of all the issues. The Defendant, DEWAYNE ALEXANDER, is necessary for final adjudication as to the paternity of the minor children as Section 101.024 of the Texas Family Code defines a parent as a man presumed to be the biological father. Failure to join Defendant, DEWAYNE ALEXANDER, in the Original Suit Affecting the Parent-Child Relationship prevents Defendant, DEWAYNE ALEXANDER, from protecting his interest as an alleged biological father. Further, his absence from the suit leaves the parties subject to potential future litigation by Defendant, DEWAYNE ALEXANDER. Texas Rules of Civil Procedure 39A provides for the joinder of all parties and the Texas

Supreme Court in *Vondy v. Commissioners Court*, 620 SW2d 104, 106 (Tex-1981) states that if a party were truly indispensable, it would be fundamental error to proceed in the parties absence. Defendant, DEWAYNE ALEXANDER, is an indispensable party to the final divorce decree, for adjudication must be rendered as to whether or not the Defendant, DEWAYNE ALEXANDER, is truly the biological father of the children.

Further, since all parties were not present, all issues were not resolved at the time of the Divorce and Suit Affecting the Parent-Child Relationship. Such issues as paternity, legal duties and rights of each person determined to be a parent, including child support, visitation inheritance and legal consequences that may result upon the death of a minor child have not been resolved. Therefore, the determination of paternity at the time of divorce is not a final order.

Further, DEWAYNE ALEXANDER, is defined as a parent and is subject to liability pursuant to Section 151.003, Subsection C, which states that "a parent who fails to discharge the duties to support is liable to the person who provides necessaries to those to whom support is owed." By testimony, Defendant, WANDA ELAINE WISE FRYAR, had knowledge at the time of the rendering of the order entered in the Suit Affecting the Parent-Child Relationship of the presumed biological father and failed to joint the presumed biological father into the Suit Affecting the Parent-Child Relationship action, thus the final decree of divorce entered on the 13th day of September, 1996, does not constitute a final order in the suit affecting the parent-child relationship. It must be stated that the law only recognizes that the children born of a marriage it is only presumed to be the child of the father of the husband to the marriage and that such presumption is rebuttable.

Section 151.002 of the Texas Family Code violates the Equal Right Amendment and is unconstitutional. The

legislature stating that the of the child born of the marriage that the husband is the presumed father places a greater burden and assigns a status due to sex without due process. Such statement is discriminating against a class, namely, husbands, due to the marital status and for no other reason. The husband of a mother of a child born of the marriage can only determine if he is the father of the child through DNA testing. Making him the presumed father unfairly discriminates in violation of the Texas Equal Rights Amendment. No comparable presumption is imposed upon the mother for the simple fact that the mother has knowledge that the child is born of the mother. Section 150.002 is further unconstitutional for the reason that at no time can a husband of a mother of a child born of the marriage be a biological father of such child if in truth in fact through scientific testing he is not the biological father. As in this case the Plaintiff was the husband of the mother of the child born during the marriage and the law has presumed that he is a biological father when in truth in fact through DNA testing he is not the biological father and at no time in the present or in the future can he ever become a biological father for it is scientifically impossible when he did not procreate the children. Finding that he is a biological father is thus impossible and ludicrous.

B. CONSTITUTIONAL PRINCIPLES AFFECTING BILL OF REVIEW

1.

The failure to grant a Bill of Review in this matter shall constitute the violation of the United States Constitution and the State Constitution. Specifically, the 14th Amendment to the United States Constitution states that no person may be deprived of life, liberty or property without due process of law. Texas State Constitution under Article 1, Section 3, 13, 19 further contains a comparable guarantee that there shall be no deprivation of life, liberty or property or disinfringement

except by due course of law. The equal protection clause of the 14th Amendment to the United States Constitution provides that all individuals are equal before the law and shall be afforded equal protection under the laws as established not only by statutory laws but by our common law principles.

2.

Consideration of our constitutionally protected concepts of due process of law and equal protection law is specifically applicable to the Plaintiff herein. As a result of the DNA testing it has been determined that the Plaintiff is not the biological father of the minor children. The Defendant Wise had testified under sworn testimony that the Plaintiff and the Defendant were the parents of the three minor children when in fact Defendant Wise knew or should have known that such allegations were false and the presentation of such evidence was false at the time the Defendant presented such evidence. The Defendant Wise knew such allegations were false and perpetuated this fraud upon the Court. Further, Plaintiff had no knowledge of the falsity of such statements and did not possess any reasonable belief at the time upon which to raise the issue of paternity. Therefore, he did not have an opportunity to contest the paternity of the three minor children at the time of the suit affecting the parent-child relationship. Plaintiff had no reason whatsoever to timely raise the issue of paternity.

Further, pursuant to Section 161.110(g) of the Texas Family Code, paternity of the presumed biological father of a child may be contested at any time during the minority of the child by a presumed father, the biological mother of the child, a governmental entity authorized agent or licensed child placing agency, and a person who is related within the second degree of consanguinity to the biological mother of the child if the biological mother of the child is deceased. Reading this Section alone the presumed father i.e. the Plaintiff herein can file a suit contesting the presumption that he is the biological

father of the child at any time during the minority of the child. Plaintiff being defined as a presumed father under Section 151.002. However, Section 160.007 states that such a suit is barred if there is a final judgment rendered by a court adjudicating a named individual to be a biological father of the child. Plaintiff herein has not been adjudicated a biological father but has only been adjudicated a father of the child as stated in the Divorce Decree. Such Decree only states that they are the parents of the children. Section 160.007 is unconstitutional and violates the Equal Rights Amendment so far as it pertains to Morgan Wise as a presumed father for the reason stated above that Morgan Wise can never be a biological father of a child as defined by the Statute. It is a scientific impossibility and further the Divorce Decree did not adjudge him as a biological father. Section 160.007 is thus unconstitutional should the same be applicable to the Plaintiff herein stating that he is a adjudicated biological father or if such Section is read that the Divorce Decree states that he is a parent of the children. There is thus greater discrimination against the husband of the mother of a child born of the marriage than that of mother. Section 161.110(g), violates the equal rights amendment of the Texas Constitution Article 1 §3a because it does not give the presumed father the right to challenge paternity but does give the biological mother the right to contest paternity.

3.

Should the Defendant Wise be afforded the protection of the Court in perpetuating this fraud and not acknowledging the truth as the truth has now been determined is to deny this Plaintiff equal protection under the laws and shall constitute a depravation of property of the Plaintiff without due process of law. Comparing the DNA testing for the biological father of the child would be likened to the DNA testing presented in the criminal court system. In such system

when individuals have been found guilty of crimes and sentenced and incarcerated and then upon DNA testing such testing is revealed that such individual could not have been the perpetuator of such crime, the Court's have reversed such convictions and have released the defendant from incarceration. DNA testing has not only proved guilt beyond a reasonable doubt it has also proved innocence.

4.

Such DNA testing should be afforded the same recognition within the civil courts system. Failure to recognize results of such DNA testing after a final Divorce Decree only denies one the equal protection of the laws as preserved by the United States Constitution. It would further result in depriving the Plaintiff of property without due process of law for now such Plaintiff is ordered to make child support payments for children which are biologically not his for which there is a taking of property without due process of law. Further, this Plaintiff is denied the equal protection of the law for this Plaintiff has been denied the right to present evidence of the non-paternity of the children when in other instances the Attorney General of the State of Texas can proceed against biological fathers of children for the collection, of the child support. If the Attorney General of the State of Texas has the right to proceed in such action, likewise the Plaintiff has a right conversely to use the DNA testing for his protection. He is thus denied the applicability of using such evidence to correct a wrong. The legal system should only foster truth and full disclosure and not the denial of such truths and to perpetuate a wrong upon the Court system and upon an innocence person as the Plaintiff.

The Plaintiff is further denied equal protection of the law if he is denied the right to contests paternity for the reason that the law recognizes that probate litigation a child is provided the right to contest the presumed paternity of the husband of the mother of the child born during the marriage. Such child

has been afforded standing to seek inheritance from the biological father notwithstanding that such child was born of a marriage which ended in divorce stating that the child was born of the husband.

5.

Conceivably, this Plaintiff may be denied liberty if a contempt order for failure to pay child support. Again, equal protection and due process of law is denied by the exclusion of DNA evidence and the failure to correct a divorce fraudulently obtained.

As the courts have recognized DNA testing to exclude alleged non-biological father and recognized Section 160.106 of the Texas Family Code, likewise the same perception of such statute should apply in this case. *In the Interest of B__M__,a child*, 570 SW2d 493 (Tex.Civ.Ap. Texarkana August 22, 1978).

Section 160.007 of the Texas Family Code provides only a limited recourse to deny paternity after final judgment. This Statute is unconstitutional for it does not grant the right of DNA testing after a final judgment, i.e. Divorce Decree, which has adjudicated the presumed father as a biological father of a child. This Statute fails to address the facts of this case which did not adjudicate a biological father but only the presumption of the father by a child from a marriage. The Plaintiff, Morgan Wise is then by this Statute denied due process of law and equal protection of law.

6.

The failure to grant a bill of review in this matter shall also constitute a violation of Texas Equal Rights Amendment Article 1, Section 3A, which states: "equality under the law shall not be denied or abridged because of sex, race, color, creed, or natural origin. This amendment is self operative". DNA testing is afforded to mothers in seeking child support from alleged biological fathers and are afforded the rights

under the Texas Family Code for paternity testing. The Plaintiff is likewise entitled to equal treatment in the ability to prove that the minor children are not his biological children and thus should be no discrimination to the Plaintiff as the father denying paternity for which Section 160.007 of the Texas Family Code does not address.

Further, the portion of the decree with respect to child support is unconstitutional under the Equal Rights Amendment. Defendant, Wanda Elaine Wise Fryar is a parent as a result of being the biological mother of the children the subject of this suit. There was no finding as to the ability of Defendant Wanda Elaine Wise Fryar to pay child support and since the rendition of the Decree of Divorce. Defendant, Wanda Elaine Wise Fryar has failed to support the children the subject of this suit. Defendant Wise, chooses not to support the children and has no physical or mental disabilities that would prevent her from support the children the subject of this suit.

C.

PETITION TO ESTABLISH PATERNITY

Pursuant to Section 160.101(a)(3) of the Texas Family Code, Plaintiff, a man presumed to be the father of a children under Section 151 of the Texas Family Code may contest his own presumed paternity. This suit is not barred by Section 160.007(a)(1) as a final order adjudicating an individual to be the biological father has not been properly entered. Further, this suit is timely under Section 160.007(b) as it is filed during a direct attack on a judgment under 160.007(a)(1).

The presumed biological father of the minor children the subject of this suit is the Defendant, DEWAYNE ALEXANDER.

The Plaintiff and as next of friend of the minor children requests the Court, promptly after the appearance of the Defendant, DEWAYNE ALEXANDER, to order the

Defendant, DEWAYNE ALEXANDER, the mother, WANDA ELAINE WISE FRYAR, and/or the children, whichever is necessary, to submit to parentage testing and to prescribe the arrangements for the tests. Such testing is to comply with Chapter 160 of the Texas Family Code.

Plaintiff requests that, after completion of the parentage testing, the Court order all parties to appear and a pretrial conference to hear to oral testimony or depositions concerning the tests and findings of the testing experts or any parentage testing experts called by any party pursuant to Chapter 160 of the Texas Family Code.

Contingent upon finding that the Defendant, DEWAYNE ALEXANDER, is the biological father of one or more of the three minor children, the Plaintiff individually hereby seeks reimbursement of all child support paid on behalf of such minor child or children and medical expenses which has been provided by the Plaintiff on behalf of the biological father pursuant to Section 151.003(c). Said sums of money sought by the Plaintiff of the Defendant, DEWAYNE ALEXANDER, exceeds the jurisdictional limits of this Court. Plaintiff further seeks future reimbursement of any and all sums of money court ordered to be paid by the Plaintiff for support of the children as well as medical expenses required to be paid by this Plaintiff for the support and necessaries of the minor child or children into the future for which the Plaintiff seeks all restitution from the Defendant, DEWAYNE ALEXANDER.

Plaintiff as next of friend of the minor children seeks the determination of paternity for future child support, and the right of inheritance, and all other legal rights for which a child is entitled from its biological parent.

D.

CIVIL CONSPIRACY AND FRAUD

Plaintiff individually complains that Defendant, WANDA ELAINE WISE FRYAR, and Defendant, DEWAYNE ALEXANDER, committed civil conspiracy in the secreting and deception that the Plaintiff was not the biological father of the three minor children. The Plaintiff alleges that the Defendants acknowledge that the birth of the three minor children as being their children and that such was hidden and secreted from the Plaintiff in order that the Plaintiff would be responsible for all the necessities and expenses associated as a biological father to a child would be required by law to consummate. The civil conspiracy is not only a fraud upon the Plaintiff but also constituted a conversion of property from the Plaintiff by the Defendant, WANDA ELAINE WISE FRYAR, in seeking child support payments and monies. The Plaintiff suffered damages as a proximate result of the civil conspiracy that exceeds the jurisdictional limits of the Court.

In addition to the civil conspiracy the Defendants in secreting the secret of the biological father of the children defrauded the Plaintiff and the Defendant, WANDA ELAINE WISE FRYAR, made material misrepresentation to the Plaintiff that were false. Defendant, WANDA ELAINE WISE FRYAR, knew that these representations were false or made them recklessly with knowledge of the truth and as a positive assertion. Defendant, WANDA ELAINE WISE FRYAR, made these representations with the intention that the Plaintiff would act on them. The Plaintiff acted in reliance on these representations and as a consequence suffered injury and damages that exceeds the jurisdictional limits of the Court.

The Defendant, WANDA ELAINE WISE FRYAR, has defrauded the Plaintiff by breaching a legal and equitable duty owed to the Plaintiff as a result of the fiduciary

relationship. This breach is fraudulent because, irrespective of Defendant, WANDA ELAINE WISE FRYAR's moral guilt, to deceive the Plaintiff and violated the Plaintiffs confidence. Defendant, WANDA ELAINE WISE FRYAR received child support payments and medical payments, all of which exceeds the jurisdictional limits of the Court and shall receive future payments by virtue of her deception for which the Plaintiff seeks damages.

The civil conspiracy by the Defendant, WANDA ELAINE WISE FRYAR, and Defendant, DEWAYNE ALEXANDER, and the fraud as alleged above constitute actual damages to the Plaintiff. Further, these acts were maliciously done for which the law allows the imposition of exemplary damages. The civil conspiracy of the Defendants and the conversion and fraud of the Defendant, WANDA ELAINE WISE FRYAR was intentional, willful, wanton, and without justification or excuse and was done with gross indifference to the Plaintiffs rights. In this connection, the Plaintiff individually would show that as a result of the Defendants, WANDA ELAINE WISE FRYAR and DEWAYNE ALEXANDER, conduct, the Plaintiff has suffered losses of time and other expenses, including attorneys fees incurred in prosecution of this action. Accordingly, the Plaintiff individually prays for exemplary damages against the Defendants.

ATTORNEY FEES

It was necessary for Plaintiff to secure the services of ROBERT D. MILLER, a licensed attorney, to prepare and prosecute this suit. Judgment for attorney's fees and expenses through final judgment, appeal to the Court of Civil Appeals, Petition for Review to the Supreme Court, and if granted, appeal to the Supreme Court of Texas and to the United States Supreme Court, should be granted against Defendants and in favor of Plaintiff for the use and benefit of Plaintiff's attorneys; or, in the alternative, Plaintiff requests that reasonable attorney's fees and expenses through final

judgment and appeal be taxed as costs and be ordered paid directly to Plaintiff's attorney, who may enforce the order for fees in the attorney's own name.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the Plaintiff prays that his Petition for Bill of Review be granted and that such portion of the Divorce Decree in Cause number 96-01-38243 dated 13th day of September, 1996 and so far as it states that the three minor children born of the marriage which the Plaintiff was declared the father of such children be set aside and a new hearing be granted in order that this Plaintiff may exercise his right of denial of paternity as provided by Section 160.101 of the Texas Family Code, that the Court makes its findings that the Statutes as alleged herein are unconstitutional in violation of the Texas Equal Rights Amendment, due process of law and the equal protection of law, that the Defendants be ordered to submit to blood testing, and upon final hearing the Court enter an order determining paternity of the children, and that the Plaintiff individually prays for judgment against the Defendants in accordance with the pleadings herein alleged and seeks actual damages and exemplary damages in a sum exceeding the minimal jurisdictional limits of this Court, including actual damages as alleged and exemplary damages, attorney fees and for pre-judgment and post-judgment interest as allowed by law, for costs of court and general relief. Plaintiff prays for reasonable attorney fees as pled herein for the prosecution of this cause as well as, the attorney fees necessary for the appeal of this cause to all higher courts as pled herein and for such other and further relief to which this Plaintiff may show himself justly entitled.

Respectfully submitted,

/s/ Robert D. Miller
ROBERT D. MILLER
608 Scurry
Big Spring, TX 79720
915/267-7449
FAX 915/267-1043
State Bar No. 14108500

Attorney for Plaintiff

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above was served on Phyllis Royal, P.O. Box 4774, Odessa, Texas 79760-4774, Celia Trimble Boone, P.O. Box 2797, Abilene, Texas 79604, by certified mail return receipt requested and John Rheinscheld, 306 Scurry, Big Spring, Texas 79720 by hand delivery in accordance with the Texas Rules of Civil Procedure on this the 14 day of March, 2000.

/s/ Robert D. Miller
ROBERT D. MILLER

EXHIBIT "A"

[Logo]

DNA
DIAGNOSTICS CENTER

DNA Parentage Test Report

Report Date 3/18/99

Case 35822 Name DoB – Race Date Collected Test No.	MOTHER Not Tested	CHILD Rowdi Morgan Wise 1/20/89 3-8-99 35822-20	Alleged FATHER Morgan Odis Wise 3/13/62 caucasian 3-8-99 35822-30
Results	Allele Sizes	Allele Sizes	Allele Sizes
D2S44		1.91	1.56
pYNH24		1.59	1.50
PI 0.00			
D4S163		8.18	5.73
SU604		4.52	4.97
PI 0.00			
D6S132		3.21	3.34
SU1090		2.69	2.69
PI 1.18			
D7S467		5.36	4.68
PAC415		3.19	3.75
PI 0.00			

Interpretation Combined Paternity Index 0 Probability of Paternity 0%

The alleged father, Morgan Odis Wise, is excluded as the biological father of the child named Rowdi Morgan Wise. The alleged father lacks the genetic markers that must be contributed to the child by the biological father. Based on testing results obtained from DNA probes: D2S44, D4S163, and D7S467, the probability of paternity is 0%.

Subscribed and sworn before me on Tuesday, Marcy 18, 1999

/s/ Edward Harris
EDWARD HARRIS
Notary Public, State of Ohio
[SEAL]

My commission Expires July 23, 2003.

I, the undersigned, verify that the interpretation of results is correct as reported, and the testing procedure was conducted in accordance with the recommended guidelines for DNA testing set forth by AABB.

/s/ Susannie C. Lee
SUSANNIE C. LEE, Ph.D.
Associate Director

EXHIBIT "B"

[Logo]

DNA
DIAGNOSTICS CENTER

DNA Parentage Test Report

Report Date 3/18/99

Case 35822 Name DoB – Race Date Collected Test No.	MOTHER Not Tested	CHILD Marti Eugene Wise 3/1/91 3-8-99 35822-21	Alleged FATHER Morgan Odis Wise 3/13/62 caucasian 3-8-99 35822-30
Results	Allele Sizes	Allele Sizes	Allele Sizes
D2S44 pYNH24 PI 0.00		2.91 2.80	1.56 1.50
D4S163 SU604 PI 0.00		6.76 4.52	5.73 4.97
D6S132 SU1090 PI 1.14		3.13 2.69	3.34 2.69
D7S467 PAC415 PI 0.00		3.19 1.62	4.68 3.75

Interpretation Combined Paternity Index 0 Probability of Paternity 0%

The alleged father, Morgan Odis Wise, is excluded as the biological father of the child named Marti Eugene Wise. The alleged father lacks the genetic markers that must be contributed to the child by the biological father. Based on testing results obtained from DNA probes: D2S44, D4S163, and D7S467, the probability of paternity is 0%.

Subscribed and sworn before me on Tuesday, Marcy 18, 1999

/s/ Edward Harris
EDWARD HARRIS
Notary Public, State of Ohio
[SEAL]

My commission Expires July 23, 2003.

I, the undersigned, verify that the interpretation of results is correct as reported, and the testing procedure was conducted in accordance with the recommended guidelines for DNA testing set forth by AABB.

/s/ Susannie C. Lee
SUSANNIE C. LEE, Ph.D.
Associate Director

EXHIBIT "C"

[Logo]

DNA
DIAGNOSTICS CENTER

DNA Parentage Test Report

Report Date 3/18/99

Case 35822 Name DoB – Race Date Collected Test No.	MOTHER Not Tested	CHILD Rauli Tabor Wise 8/31/91 3-8-99 35822-22	Alleged FATHER Morgan Odis Wise 3/13/62 caucasian 3-8-99 35822-30
Results	Allele Sizes	Allele Sizes	Allele Sizes
D2S44 pYNH24 PI 0.00		2.80 1.59	1.56 1.50
D4S163 SU604 PI 0.00		3.23 2.03	5.73 4.97
D6S132 SU1090 PI 2.90		3.34 2.69	3.34 2.69
D7S467 PAC415 PI 0.00		5.36 4.91	4.68 3.75

Interpretation Combined Paternity Index 0 Probability of Paternity 0%

The alleged father, Morgan Odis Wise, is excluded as the biological father of the child named Rauli Tabor Wise. The alleged father lacks the genetic markers that must be contributed to the child by the biological father. Based on testing results obtained from DNA probes: D2S44, D4S163, and D7S467, the probability of paternity is 0%.

Subscribed and sworn before me on Tuesday, Marcy 18, 1999

/s/ Edward Harris
EDWARD HARRIS
Notary Public, State of Ohio
[SEAL]

My commission Expires July 23, 2003.

I, the undersigned, verify that the interpretation of results is correct as reported, and the testing procedure was conducted in accordance with the recommended guidelines for DNA testing set forth by AABB.

/s/ Susannie C. Lee
SUSANNIE C. LEE, Ph.D.
Associate Director

EXHIBIT "D"

AFFIDAVIT

STATE OF TEXAS

COUNTY OF HOWARD

Before me, the undersigned authority, on this day personally appeared Morgan Wise and upon his oath stated as follows:

"I am the Plaintiff in the above entitled cause. I am above the age of 18 years and competent to make this affidavit. At the time of the granting of the Divorce Decree, for which my ex-wife Wanda Elaine Wise Fryar was the Petitioner, dated the 13th day of September, 1996, I had no knowledge or even any possibility of such knowledge or any acts which would confirm that I was not the biological father of the three minor children, Rowdi Morgan Wise, Marti Eugene Wise and Raulie Tabor Wise. Specifically, I had no knowledge that 9 months prior to the dates of January 20, 1989, March 1, 1991 and August 31, 1992, that my ex-wife was engaged in any extra-marital relationship or involved herself in any activities which would result in the paternity of the three minor children to be other than that of myself. At no time during this period of time, 9 months prior to the birth of the three minor children respectfully, did my ex-wife Wanda Elaine Wise Fryar advise me that she was involved in extra-marital affairs, was seeing other men, or was involved in any relationships with any other man other than myself. On the contrary, Wanda Elaine Wise Fryar at all times stated that I was father of these minor children throughout the entire term of our marriage relationship and even so stated the same at the time of the trial upon the merits of the divorce proceeding for custody of the minor children wherein her perjured testimony stated that I was the father of such children. I relied upon the fiduciary and trust relationship established as man and wife in a marriage relationship at the time the three

minor children were born and by her breach of such fiduciary relationship and the fraud committed upon me I had no knowledge that there was ever a possibility that such children were not the biological children of myself and thus, there was no necessity to deny paternity of such children at the time of the Final Decree of Divorce which was entered on the 13th day of September, 1996.

The minor child, Raulie Tabor Wise suffers with cystic fibrosis. In the medical treatment of such child, it became necessary that a determination be made as to the genetic carrier of the cystic fibrosis and whether or not I myself was such carrier. Genetic screening was conducted wherein it was determined that I was not a carrier of cystic fibrosis which thus raised the issue as to the genetic chain of how such child could suffer cystic fibrosis. It thus became necessary that DNA testing of myself and the minor child to be conducted to rule out that there was any possibility that such minor child was not the biological child of myself. In doing the DNA testing it was as convenient and economical to do DNA testing of all three minor boys to ascertain definitively that all such children were my biological children.

The basis of this DNA testing constitutes the complete defense and grounds for denial of paternity in the original proceeding for divorce and the filing of the Final Decree for Divorce.

This fraud which was exercised upon me is not the result of any negligence upon my part for at no time were there ever any fact or statements made prior to the entry of this Divorce Decree that raised any suspicion that I was not the biological father of the children. There was no necessity for DNA testing for there was no request by any medical doctor to do such testing as subsequently occurred.

/s/ Morgan Wise
MORGAN WISE, Affiant

SIGNED AND SWORN TO before me on 16 day of June, 1999.

/s/ Marty Tindol
MARTY TINDOL
Notary Public, State of Texas

[SEAL]

APPENDIX F

IN THE DISTRICT COURT
HOWARD COUNTY, TEXAS
118TH JUDICIAL DISTRICT

In the Matter of the Marriage of

WANDA ELAINE SCROGGINS WISE and MORGAN ODIS WISE

and in the interest of CARLI ANN WISE, ROWDI MORGAN WISE, MARTI EUGENE WISE, and RAULI TABOR WISE, MINOR CHILDREN

STATEMENT OF FACTS
(Temporary Orders Hearing)

APPEARANCES

For The Petitioner: TIMOTHY D. YEATS
Attorney at Law
500 Johnson Street.
Big Spring, Texas 79720

For The Respondent: ROBERT D. MILLER
Attorney at Law
608 Scurry
Big Spring, Texas 79720

BE IT REMEMBERED that on the 25th day of January, 1996, the same being one of the days of the regular January Term, 1996, of the 118th Judicial District Court in and for Howard County, Texas., the above entitled and numbered cause came on for hearing before the Honorable ROBERT H. MOORE, III, Judge for said court, sitting without a jury, taken before KAREN E. FREEMAN, CSR, RPR, Official Court Reporter for said court, whereupon the following proceedings were had:

* * * *

[29]

REDIRECT EXAMINATION

BY MR. YEATS:

Q. Wanda, just a few more questions.

A. Okay.

Q. The attorney questioned you about Joey McMahan. What's your relationship with Joey McMahan?

A. He's a really good friend of mine. I've known him since high school.

Q. On those occasions where you said you—you rode around with Joey before. Is that right?

A. Yes, sir.

Q. Would you tell your husband when that happened?

A. I told him on the first time.

Q. Okay. Have you ever had an extramarital affair with Joey McMahan?

A. No.

Q. Have you ever had an extramarital affair with any man during your marriage?

A. No.

Q. You said you have a lot of men friends. What do you mean by that?

A. Well, I have a lot of girlfriends, too,

* * * *

APPENDIX G

RULES OF CIVIL PROCEDURE

Federal

RULE 60. RELIEF FROM JUDGMENT OR ORDER

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:

(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(6) any other reason justifying relief from the operation of the judgment.

APPENDIX H

TEXAS FAMILY CODE

§ 160.007. SUIT BARRED.

(a) Except as provided by Subsection (b), a suit under this chapter with respect to a child is barred if final judgment has been rendered by a court of competent jurisdiction:

(1) adjudicating a named individual to be the biological father of the child; or

(2) terminating the parent-child relationship between the child and each living parent of the child; or

(3) granting a petition for the adoption of the child.

(b) During the pendency of an appeal or direct attack on a judgment described by Subsection (a), a suit under this chapter may be filed but shall, on motion of a party, be stayed pending the final disposition of the appeal or direct attack on the judgment.